Supreme Court, U.S.
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No. 98 102

In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, a Colorado Nonprofit Corporation,

Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a county ignore the holdings of this Court and avoid liability under the takings clause for a categorical taking of all interest in a severed mineral lease solely because the owner acquired the interest with knowledge of an existing regulatory scheme?

Do the Fifth and Fourteenth Amendments to the United States Constitution require a county to pay just compensation when it deprives a lessee of a severed mineral interest of all economically beneficial use of its property interest?

PARTIES TO THE PROCEEDING

The parties to this action in the Colorado Court of Appeals were Pete Lien & Sons, Inc.; the Board of County Commissioners of Larimer County; its individual Commissioners John Clarke, Janet Duvall, and Jim Disney in their official capacities; Janet Duvall in her individual capacity and the Sandy Flats Defense Coalition.

Pete Lien & Sons, Inc. has no parent nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Pete Lien & Sons, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the state of Colorado, entered in the above-entitled proceeding on August 28, 1997.

OPINIONS BELOW

This petition is from a decision of the Colorado Court of Appeals reproduced as Appendix A. On October 23, 1997, the Colorado Court of Appeals denied Petitioner's petition for rehearing and is reproduced as Appendix B. Page references are to the appendix. (App.)

The Colorado Supreme Court denied Petitioner's petition for writ of certiorari on April 20, 1998. This decision is reproduced as Appendix C.

The Colorado District Court issued one relevant decision on November 29, 1995, granting Respondent's motion for partial summary judgment on the takings issue, and is reproduced as Appendix D.

JURISDICTION

The decision of the Colorado Supreme Court denying petitioner's petition for writ of certiorari was dated April 20, 1998. This petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section I of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within it jurisdiction equal protection of the laws."

Article II Section 15 of the Colorado Constitution provides in pertinent part: "Private property shall not be taken or damaged, for public or private use, without just compensation."

STATEMENT OF THE CASE

INTRODUCTION

On February 6, 1995, Respondent Board of County Commissioners "Board" denied the application of Petitioner Pete Lien & Sons, Inc. "Lien" for use on review to open and operate a silica sand quarry "Sandy Flats" in the O-Open zone of Larimer County, Colorado.[1] This denial surprised Lien since it was the Board which had

[1] Mining and quarrying of minerals is a use authorized on review in the O-Open zone in Larimer County regulated under the Larimer County Comprehensive Plan. Use "on review" is not a use by right but is a use permitted with approval by the Board after a public hearing. Appendix A, App. 10.

asked Lien to develop an alternative quarry to the Weaver quarry operated by Lien.[2] Appendix A, App. 3.

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[2] In the late 1980's, Lien purchased 300 acres of land in Larimer County and opened the Weaver Quarry as a small scale quarry. In 1991 Lien sought to expand the Weaver Quarry. Because the Weaver Quarry was located in the O-Open zone, Lien applied to the Board for use on review. Lien's application was met with opposition from surrounding property owners. The Board then denied Petitioner's expansion application. Lien appealed and the Colorado District Court partially reversed the Board's decision based upon a Federal supremacy issue involving unpatented mining claims owned by Lien and which occupied a portion of the Weaver Quarry property. The district court's decision was upheld by the Colorado Court of Appeals. 93 CA 1535. As a result of this decision, the Board asked Lien to find an alternative quarry site. In an attempt to accommodate the Board's desires, and to be a good corporate citizen, Lien undertook the expensive process of locating and permitting the Sandy Flats property as an alternative silica sand quarry. Lien spent in excess of One Hundred Fifty Thousand Dollars ($150,000) to obtain permits for the proposed Sandy Flats operation. Appendix A, App. 3. Lien also applied to the Colorado Mined Land Reclamation Division "MLRD" for, and obtained, a mining and reclamation permit. The Larimer County Planning Commission approved Lien's application and recommended approval to the Board based on the Planning Commission Staff's determination that Lien's application (1) complied with the intent and purposes of the Larimer County Comprehensive Zoning Resolution and Land Use Plan; (2) was harmonious with surrounding land use; (3) would have little or no impact on other property values in the area; and (4) would not impair the public health, welfare, prosperity, or safety. (See Plaintiff's Brief, Dist. Ct. at 4.) Unfortunately, before Lien came before the Board, an election took place which resulted in a change in the members of the Board. The new members of the Board disregarded the fact that Lien had been asked by the prior Board to pursue the new quarry site.

A. The property

The property in this case, a severed mineral estate in 640 acres of land, was leased to Lien by Rock Springs Royalty Company "RSRC" in 1994.[3] Neither Lien nor RSRC, the lessor, own the surface estate.[4] The surface estate is owned by individuals not a party to this litigation. The lease from RSRC to Lien was subsequent to the adoption of the Larimer County Comprehensive Plan. Appendix A, App. 10.

B. The Litigation

1. The Colorado District Court

The procedure in Colorado for an appeal from a decision by the Board, a quasi-judicial governmental entity, is to file a complaint in the Colorado District Court.[5] Lien timely filed its complaint alleging, among

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[3] Severed mineral estates are not uncommon in the United States. A severed mineral estate is the result of severing the mineral estate from the surface estate so that the two estates are vested in different parties. 6 American Law of Mining, § 200.01 et seq. (2d ed. 1984).

[4] Union Pacific Railroad Company "UPRC" acquired both the mineral estate and the surface estate from the United States via patent pursuant to the Union Pacific Railway Acts of 1862 and 1864. UPRC through a deed reservation reserved the mineral estate to itself and conveyed the surface estate to a third party. UPRC conveyed the mineral estate to RSRC, the lessor. RSRC then leased the mineral estate to Lien in 1994. (See Amicus Curiae Brief of Union Pacific Resources Group, Inc., at Introduction.)

[5] The procedure for such an appeal is set forth at C.R.C.P. 106(a)(4).

other things, that the Board's action in denying Lien's application to open and operate the sand quarry constituted a regulatory taking of all use of its severed mineral estate and, therefore, constituted a categorical taking under the Fifth and Fourteenth Amendments to the United States Constitution which required just compensation. (Amended Complaint, p. 7.)

The Board moved for partial summary judgment on Lien's takings claims, predicated on several theories including the Colorado doctrine of "Self-Inflicted Hardship."[6] In response, Lien argued that the Board's denial of Lien's application constituted a categorical taking of all use of Lien's mineral estate, the Self-Inflicted Hardship doctrine did not apply. Lien relied upon case law from this Court, other federal courts, and Colorado courts which establish that where the government deprives an owner of any use of his property, the government must pay just compensation for the categorical taking, unless the restriction "inheres in the title itself, in the restrictions that background principles of a State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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[6] Under the "Self-Inflicted Hardship" doctrine, a property owner who acquires property subject to an existing regulatory scheme may be precluded from asserting a takings claim if the regulatory scheme later is applied to restrict the use of the property. *Cottonwood Farms v. Board of County Commissioners*, 763 P.2d 551 (Colo. 1988). Significantly, the Colorado Supreme Court has held that this doctrine does not prohibit the property owner from challenging the validity of the regulation on the ground that it effects a taking without just compensation. *Id.* at 558.

(Plaintiff's Memorandum Brief in Opposition to Defendant's Motion for Partial Summary Judgment, Dist. Ct. at 10-18.)

The Colorado District Court ignored the fact that the denial of Lien's application resulted in a categorical taking. In a one paragraph decision, the District Court granted the Board's motion for summary judgment. The District Court never addressed the relevant decisions of this Court and the state courts of Colorado and cited no authority to support its decision.[7] Instead, the District Court merely stated that "(Lien) was fully aware that it had to obtain permission from the Board of County Commissioners to obtain the benefits of any mineral lease. There was no taking, but an exercise of its authority by the Board." Appendix D, App. 20.

2. Colorado Court of Appeals

Lien appealed. On appeal, Lien argued that (i) the District Court ignored the relevant decisions of this Court; (ii) given the fact that the denial of Lien's application deprived Lien of any and all use of the severed mineral estate, the denial resulted in a categorical taking; and (iii) the District Court erred by applying the ad hoc factual inquiry approach, first adopted by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), rather than the antecedent inquiry approach

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[7] Lien requested permission for oral argument in front of the District Court. However, the District Court issued its decision without affording Lien the opportunity to make oral argument.

adopted in *Lucas* for categorical takings cases. (Appellant's Opening Brief, Court of Appeals at 14-19.)

The Colorado Court of Appeals affirmed the District Court. Appendix A. Following the District Court's lead, the Court of Appeals made no attempt to apply or address the relevant decisions of this Court which deal with categorical takings. Instead, like the District Court, the Court of Appeals relied upon the ad hoc investment-backed expectation standard articulated by this Court in *Penn Central*, holding that

> When the regulated party is on notice of the extent of the government's regulatory authority over its property, then the "reasonable investment-backed expectation" of such party is the dispositive factor in takings analysis. We conclude that this factor is dispositive here.

Appendix A, App. 9-10.[8] The Court of Appeals concluded it was unreasonable for Lien to expect approval. Appendix A, App. 11. The Court of Appeals made no attempt to analyze or discuss the restrictions, if any, placed on use of Lien's mineral interest by Colorado's law of property or nuisance.[9] Instead, the Court of Appeals concluded that

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[8] Lien noted that for the Court of Appeals to conclude that the investment-backed expectation standard is controlling, the Court of Appeals had to ignore both *Lucas* and settled Colorado law holding otherwise. *Cottonwood Farms*, 763 P.2d at 558 ("In our view, . . . it would not prohibit the owner from challenging the validity of the regulation on the ground that it effects a taking without just compensation.")

[9] Settled law in Colorado has previously established that mining cannot be prospectively enjoined as a nuisance. *Green v. Castle Concrete Co.*, 181 Colo. 309, 509 P.2d 588 (Colo. 1973).

because Lien acquired the mineral estate with knowledge of the Board's regulatory authority, Lien effectively was barred from pursuing a takings claim. Appendix A, App. 10-11.

3. Colorado Court of Appeals' Petition for Rehearing

Lien petitioned the Court of Appeals for rehearing. Again, Lien raised the same issues raised previously and pointed out to the Court of Appeals that its decision failed to address the relevant decisions of this Court. (Appellant's Petition for Rehearing, Court of Appeals, at 1-3.) The Court of Appeals denied Lien's petition without comment. Appendix B.

4. Colorado Supreme Court

Lien petitioned the Colorado Supreme Court for a writ of certiorari. Lien advanced the same arguments it advanced in the Court of Appeals and the District Court. (Petition for Writ of Certiorari, Colo. Sup. Ct., at 4-12). The Colorado Supreme Court denied Lien's petition for writ of certiorari, with Justice Kourlis dissenting.[10] Appendix C, App. 17-18.

Neither the Court of Appeals nor the District Court ever addressed the nuisance issue nor *Green*.

[10] Justice Kourlis would have granted certiorari on the following issues:

(1) Did the Court of Appeals err in holding that the defendant's action, which deprived Lien of any use of its

REASONS FOR GRANTING THE WRIT

Six years after this Court's decision in *Lucas*, some courts continue to resist its application. The Colorado courts, for example, despite urging from Lien, ignored and failed to discuss or apply the standard adopted in *Lucas* for categorical takings, such as the taking by the Board of Lien's severed mineral interest. Instead, the Colorado courts have adopted a new legal standard diametrically in opposition to *Lucas*, i.e., that a property owner's notice of preexisting regulations somehow relieves a government of its constitutional obligation to pay just compensation for a categorical taking. This new legal standard is totally at odds with *Lucas* for categorical takings and is a throwback to the *Penn Central* standard which this Court expressly rejected in *Lucas* for categorical takings.[11] *Lucas* at 2893.

The Colorado courts are not the only courts that have chosen to ignore and create exceptions to *Lucas*. In *City of Virginia Beach v. Richardson Bell*, 1998 W.L. 120262 (Va. February 27, 1998), *cert. filed*, 97-2061, the Virginia Supreme Court held that a landowner could not have suffered a compensable taking as a matter of law where he acquired the property after a local ordinance had been

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severed mineral interest, did not constitute a taking which required just compensation under the United States and Colorado Constitutions?

(2) Did the Court of Appeals err in basing its conclusion that there was not a compensable taking on the Board's finding that the proposed use might constitute a nuisance in the future?

[11] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

enacted. The issue in that case is strikingly similar to the issue in this case. Under what circumstances can a property owner's right to just compensation be denied solely because the property owner acquired the interest in property subsequent to regulations regulating the use of the property? In a categorical takings case, are there any circumstances other than a state's property law and nuisance law that justify denial of just compensation?

This Court in *Lucas* articulated a nuisance exception to the requirement of just compensation for categorical takings. This Court also suggested in *Nollan* that the timing of the property acquisition is not dispositive of the right to just compensation. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, n.2 (1987).

In addition, the courts of at least four other states which have decided the identical issue in this case have decided that the timing of the property acquisition vis-à-vis the establishment of a regulatory scheme is not dispositive so as to deny just compensation. On the other hand, in addition to Colorado and Virginia, the state of New York has determined that timing vis-à-vis the establishment of regulations is dispositve and can defeat the right to just compensation.[12]

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[12] *Kim v. City of New York*, 681 N.E.2d 312, *cert. denied*, 118 S.Ct. 50 (1997) physical invasion by government of 2,390 square feet of lot); *Gazza v. New York State Department of Environ.*, 679 N.E.2d 1035 (1997), *cert. denied*, 118 S.Ct. 58 (1997) (no per se taking); *Annello v. Zoning Board of Appeals*, 678 N.E.2d 870 (N.Y. 1997), *cert. denied*, 118 S.Ct. 2 (1997)(New York statutory restriction encumbered title from outside of ownership).

Thus, based upon conflicting decisions from the lower courts, it is clear that the right of just compensation guaranteed under the Fifth and Fourteenth Amendments is not a right universally recognized in all the states. Some states appear to be deliberately ignoring *Lucas* by creating new exceptions which are not based upon the antecedent inquiry into a state's background principles of property law and nuisance law.

The Court of Appeals decision is a perfect example of this deliberate circumvention of *Lucas*. It is not based upon Colorado property law which clearly favors mining and quarrying of minerals. Furthermore, Colorado law specifically provides that mining is a lawful business activity which **cannot** be prospectively enjoined on the grounds that it might constitute a nuisance.[13]

If the notice of preexisting regulations exception is a bar to compensation in the second type of categorical taking described in *Lucas*, is it also a bar to the first type of categorical taking, i.e., a physical invasion by the government? What is to prevent government from promulgating statutes and regulations specifying the circumstances under which it is deemed necessary for government to physically invade private property to prevent a use government deems inappropriate? If the statutes and regulations preexist property ownership does that fact, in and of itself, act as a bar to just compensation?

The importance of this issue, combined with the conflict among the states, strongly militates in favor of this

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[13] *Green*, 509 P.2d at 591.

Court exercising its supervisory powers. This Court should grant the petition to resolve the conflict among the states and to prevent local governments from circumventing the holding in *Lucas* and its progeny.

ARGUMENT

I. THE COLORADO COURT OF APPEALS ERRED IN HOLDING THAT THE BOARD'S ACTION, WHICH DEPRIVED LIEN OF ALL USE OF ITS SEVERED MINERAL INTEREST, DID NOT CONSTITUTE A TAKING WHICH REQUIRED JUST COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

A. A Severed Mineral Lease Is A Property Interest Subject To The Takings Clause

Colorado has long recognized that mineral estates and surface estates are separate and distinct property interests.[14] See, e.g., *Frankfort Oil Co. v. Abrams*, 159 Colo. 525, 413 P.2d 190, 194 (Colo. 1966); *Rocky Mountain Fuel Co. v. Heflen*, 148 Colo. 415, 366 P.2d 577, 580 (Colo. 1961). Although the issue has not been addressed by Colorado courts, other courts consistently have held that mineral rights and mineral leases are property rights subject to the takings clause of the Fifth Amendment. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (F. Cir.), *cert. denied*, 502 U.S. 952, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991)

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[14] The Colorado courts never addressed and the Board never challenged that the mineral lease held by Lien is a property interest subject to the requirements of just compensation under the Fifth and Fourteenth Amendments.

(Wyoming federal coal lease); *Miller Bros. v. Department of Natural Resources*, 203 Mich. App. 674, 513 N.W.2d 217 (Mich. App. 1994) (federal oil and gas lease); *KLK, Inc. v. U.S. Department of Interior*, 35 F.3d 454 (9th Cir. 1994) (unpatented mining claims); *United States v. Petty Motor Co.*, 327 U.S. 372, 378-79 (1946) (mineral lease).

B. The Colorado Court Of Appeals Ignored Controlling Decisions Of This Court For Categorical Takings

This case is on all fours with *Lucas*. In *Lucas*, this Court articulated two discrete categories of regulatory action which require compensation without the case-specific inquiry into the public interest advanced in support of the restraint. *Lucas*, 112 S.Ct. at 2893. The second exception to the *Penn Central* ad hoc analysis, the exception the *Lucas* court characterized as categorically requiring just compensation, is where a regulation denies all economically beneficial or productive use of land.[15] *Id.* When all reasonable economic use is denied, as is true in this case, the *Lucas* analysis requires that just compensation be paid **unless** the limitation ". . . inhere(s) in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 2900. The inquiry into a state's law of property and nuisance is the antecedent inquiry articulated in *Lucas*. *Id.* at 2899. Under this antecedent inquiry approach, if a person or the government

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[15] The first category of regulatory action which is compensable without the ad hoc case-specific inquiry is a physical invasion. *Id.*

could prohibit an owner's use of property under a state law of private nuisance or public nuisance, respectively, no taking requiring just compensation has occurred. *Id.* at 2900. On the other hand, if the proposed use could not be prohibited under the state's public or private law of nuisance, then the government may prohibit the proposed use only if it pays just compensation.[16] *Id.*

1. The first prong of the *Lucas* analysis is a determination of whether or not the deprivation is categorical

The Colorado Court of Appeals ignored whether or not the Board's denial of Lien's application amounted to a categorical denial of all economically beneficial or productive use of land. This apparent refusal to make a determination on the categorical nature of the taking occurred despite the fact that the Board did not dispute that there was no remaining use for the severed mineral lease.[17]

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[16] Lien recognizes that the Board had the authority to prevent Lien from using the severed mineral estate if the Board properly concluded that it was in the best interest of the public to prevent such use. However, the fact that the Board had the authority does not mean that the exercise of that authority does not result in a categorical taking of Lien's mineral interest which requires just compensation. *Id.* at 2893.

[17] The Board did not disagree with Lien's contention that Lien could make no use of the property interest. Instead, the Board argued that the relevant parcel should not be limited to the mineral lease. This argument ignores the fact that neither Lien nor RSRC own the surface estate and that the severance of the mineral estate from the surface estate occurred early in the century.

2. The Colorado Court of Appeals ignored the second prong of the *Lucas* analysis

The second prong of the *Lucas* analysis is the antecedent inquiry into whether or not the denial by the Board duplicated the result that could have been achieved by the courts through an action for public or private nuisance. *Id.* at 2900. If not, just compensation is required. *Id.* at 2893. The Colorado Court of Appeals refused to make this antecedent inquiry.

Had the Colorado Court of Appeals engaged in the antecedent inquiry required by *Lucas*, it would have found that Lien's proposed use could not have been prospectively enjoined as a public or private nuisance under Colorado law. *Green*, 509 P.2d at 591. Neither Colorado statutory law nor the Larimer County Comprehensive Plan **prohibit** the quarrying or mining of the property subject to the severed mineral lease.[18] Instead, Colorado statutory law provides that as a matter of public policy, the mining and quarrying of minerals is a necessary and proper activity that is compatible with land uses.[19] Furthermore, Colorado statutory law sets forth Colorado public policy which prohibits the Board from allowing any use of property which would interfere with the mining or extraction of commercial mineral deposits which include sand.[20] Moreover, in *Green*, the

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[18] See f.n. 1.

[19] C.R.S. § 34-32-102.

[20] See, e.g., C.R.S. § 34-1-305(1) which states " . . . (N)o board shall . . . permit the use of any area known to contain a commercial mineral deposit in the manner which would

Colorado Supreme Court held that "It should be noted that our decision is merely a holding that broad injunctive powers may not be used in advance to prohibit lawful business activity [quarrying of limestone] which may not be a nuisance." *Green*, 509 P.2d at 591.[21]

Thus, despite the fact that Lien repeatedly argued that this case fits squarely within this Court's *Lucas* decision, the Colorado courts, for one reason or another, deliberately avoided the *Lucas* analysis. Instead, the Colorado courts adopted a new exception to *Lucas* under which just compensation will be denied whenever a property owner is on notice of preexisting regulations.

II. THE FACT THAT LIEN WAS AWARE OF THE BOARD'S REGULATORY AUTHORITY WHEN LIEN ACQUIRED ITS PROPERTY INTEREST DOES NOT RELIEVE THE BOARD FROM ITS OBLIGATION TO PAY JUST COMPENSATION FOR ITS CATEGORICAL TAKING OF LIEN'S PROPERTY

The Court of Appeals held that the " 'reasonable investment-backed expectation' of (Lien) is the dispositive factor in takings analysis." Appendix A, App. 9-10.[22]

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interfere with the present or future extraction of such deposit by an extractor".

[21] Furthermore, as noted in *Green*, "the record is devoid of any proof that the quarry has been or *will in fact* be a nuisance. Speculation as to the future harmful effects of blasting and from dust pollution are not based on any actual occurrences . . . " *Id.* In this case the Board's conclusion was based upon unsworn anecdotal speculation testimony of what might occur in the future. See Petition for Writ of Certiorari, Colo. Sup. Ct. at p. 11.

[22] Why the Court of Appeals adopted the reasonable investment-backed expectation standard, this Court articulated

The Court of Appeals went on to conclude that " . . . expectations of unregulated use are generally considered unreasonable when an extensive regulatory scheme is in place at the time of the investment". Appendix A, App. 10. This new exception is contrary to this Court's decisions in *Lucas* and *Nollan*, as well as decisions by the Federal Circuit Court of Appeals and the courts of at least four other states.

A. The New Notice Exception Relied On By The Colorado Courts Is Diametrically In Conflict With This Court's Decisions In *Lucas* And *Nollan*

This Court previously has stated that a property owner's rights are **not** altered merely because he acquired the property subject to governmental regulatory authority. *Nollan*, 483 U.S. at 833 n.2. Rather, the new property owner steps into the shoes of the prior owners. "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*[23] In

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in *Penn Central* is unknown. The reason cannot be because of any failure by Lien to urge the *Lucas* analysis. (See, Appellant's Opening Brief, Court of Appeals, at 14-19.)

[23] This Court's holding in *Nollan* is consistent with the Colorado Supreme Court's holding that the Self-inflicted Harm doctrine does not apply to a takings claim alleging the denial of all reasonable economic use of property. *Cottonwood Farms*, 763 P.2d at 558. In support of its holding, the Colorado Supreme Court noted that: "A contrary rule might encourage the adoption of overly restrictive zoning regulations. The self-

this case, Lien stepped into the shoes of its lessor, RSRC. Just as the Board could not deny RSRC just compensation for the categorical taking of its mineral interest, the Board cannot deny just compensation to Lien.[24]

B. The Colorado Court Of Appeals' Decision Conflicts With Decisions From Other States That Fifth And Fourteenth Amendment Protections Are Not Abrogated Because A Property Owner Acquires Property After Regulations Are Adopted

The Colorado courts view that notice of a regulatory scheme is the "dispositive issue" is also contrary to decisions by the courts of several other states in categorical deprivations.

1. Florida has rejected the Colorado approach

In *Vatalaro v. Department of Environmental Regulations*, 601 So.2d 1223, *review denied*, 613 So.2d 3 (Fla. 1992), Mrs. Vatalaro, a property owner, sought a dredge and fill permit so that she could construct two homes on residentially zoned land. Florida argued Mrs. Vatalaro was on constructive notice that the building of two homes might

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inflicted hardship doctrine cannot serve to insulate a zoning regulation that offends constitutional standards . . . without just compensation from legitimate challenges by a property owner." *Id.* The same concern about encouraging excessive regulation exists in this case.

[24] Interestingly, the Board via its decision, has denied RSRC any use of its severed mineral lease by denying RSRC future royalty income from Lien.

be denied because of existing regulations in place to protect wetland property.

The Florida District Court of Appeals disagreed with Florida's position, holding that the denial of the dredge and fill permit constituted a taking even though the denial was based upon regulations that existed prior to Mrs. Vatalaro acquiring her interest in the property. *Id.* at 1229. The Florida Court noted, however, that the decision could have been different had Mrs. Vatalaro sought a change in zoning instead of a permit denial. *Id.* at 1229.

2. Massachusetts has rejected the Colorado approach

In *Lopes v. City of Peabody*, 32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992), *review denied*, 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted* and *judgment vacated*, 113 S.Ct. 1574 (1993), *on remand*, 417 Mass. 299, 303, 629 N.E.2d 1312, 1314-15 (1994), a case in which the procedural history is strikingly similar to this case, the Massachusetts Supreme Judicial Court, on remand from this Court, held that a property owner is entitled to challenge a preexisting land use restriction that results in a taking of private property.

Six years after the city adopted a zoning provision, Mr. Lopes acquired a lot and three other noncontiguous parcels. The lot was zoned for a single family residence and was located in a conservancy district. *Id.* Mr. Lopes was prohibited from building a residence as a result of wetland regulations. *Id.* at 1313-14.

Mr. Lopes commenced this litigation in the Massachusetts Land Court. The Land Court ruled that the denial was not unreasonable and was a valid exercise of legislative discretion and not a taking. *Id.* at 1314.

In 1992 the Massachusetts Appeals Court, in an unpublished memorandum, concluded that Mr. Lopes had no practical or beneficial use of his land but that the conservation objectives and prevention of flood damage justified the restriction. *Id.* The Appeals Court found it to be significant that Mr. Lopes had purchased the property with full knowledge of the restriction. *Id.*

The Massachusetts Supreme Judicial Court denied Mr. Lopes' application for appellate review. *Id.* This Court granted certiorari and vacated the judgment of the Land Court and remanded to the Massachusetts Appeals Court for further consideration in light of this Court's decision in *Lucas*. *Id.* The Massachusetts Supreme Judicial Court then granted a request for a direct review. The Massachusetts Supreme Judicial Court then held that

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances and tend to press owners to bring actions challenging any zoning provisions of doubtful validity before selling their property.

Id. at 1315.

3. New Jersey has rejected the Colorado approach

In *Moroney v. Mayor and Council*, 633 A.2d 1045, 1046 (N.J. Super. A.D. 1993), Mr. and Mrs. Moroney owned a lot which did not meet the requirements of the local zoning ordinance for construction of a single family home. The Moroneys were then denied a hardship variance to construct a single family residence. *Id.* The Moroneys then commenced litigation wherein the lower court determined that the denial of the variance constituted inverse condemnation. *Id.* 1046-47.

On appeal by the Borough, the New Jersey Appeals Court held that the Moroneys stood in the shoes of their predecessors in title. *Id.* at 1048. The Appeals Court determined

> That law provides . . . a right to relief possessed by the original owner passes to the successor in title. Such right is not lost simply because the succeeding owner bought or contracted to buy with knowledge of the lot-size restriction.

Id.

4. Michigan has rejected the Colorado approach

In *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996), J.F.K. Company acquired property on which to build a

restaurant subsequent to the issuance of wetland regulations.[25] *Id.* at 415. The necessary permit was denied based upon a determination that approximately 28 acres of the property was a protected wetlands. *Id.*

J.F.K. Company brought suit in the Michigan Court of Claims which held that the denial of the permit was a compensable taking. *Id.* at 416. The state of Michigan argued that the wetlands regulations which formed the basis for the reason of denial were enacted prior to J.F.K. acquiring title to the property. *Id.* at 417. Thus, the state of Michigan argued, J.F.K. was on notice because J.F.K. acquired title to the property after the enactment of the wetland regulations. The Michigan Court of Appeals, citing this Court's footnote 2 in *Nollan*, rejected the state's argument.

> The passage of the (regulation) cannot be understood as depriving J.F.K. Company of just compensation merely because the (regulation) was in effect when the quit claim deed was executed. Because we have concluded that the interests served by the proscribed use in this case do not inhere in the title itself, the timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation.

Id. at 418. The state further argued that the permit denial was based upon fundamental principles of Michigan property law. *Id.* at 417. The Michigan Court of Appeals

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[25] *K & K* was reversed by the Michigan Supreme Court at 575 N.W.2d 531 (Mich. 1998) for other reasons, i.e., a determination of the relevant parcel size.

rejected the state's argument and noted that "The decision to build a restaurant on land, or a request to fill in wetlands, does not constitute a nuisance that the government may abate." *Id.*

C. The Federal Appeals Court For The Federal Circuit Has Expressly Rejected The Colorado Approach

In *Preseault v. United States*, 100 F.3d 1525 (F. Cir. 1996), the Preseaults own a fee simple interest in a tract of land in Vermont on which they own a house. Three parcels within this tract are subject to railroad rights-of-way. *Id.* at 1531. By their own terms, if the railroad rights-of-way were no longer being used for railroad purposes, the interest would revert back to the owners of the underlying land. *Id.* Under the Federal Rails-to-Trails Act of 1983, abandoned rights-of-way could be converted for public use. *Id.* at 1529.

The Preseaults challenged the conversion. The United States argued that the Preseaults' property interests were not defined when the railroad originally acquired its rights-of-way in 1899, but were instead modified by subsequent enactments by the United States. *Id.* at 1537.

The Federal Court of Appeals disagreed with the position of the United States. The Court of Appeals concluded that

> Nothing in *Lucas* suggests that the background principles of a states property law include the sweep of a century of federal regulatory legislation, and indeed much of what the Supreme

> Court said then, as well as in *Preseault II*, about property rights indicates to the contrary.

Id. at 1539.

D. The Colorado Court Of Appeals' Decision Will Create Confusion Regarding The Use Of Property And Will Create Needless Litigation

The Court of Appeals' deliberate circumvention of the categorical analysis outlined in *Lucas* creates confusion and uncertainty for categorical takings cases. Instead of the *Lucas* analysis, the dispositive factor is the notice of preexisting regulations which may have nothing to do with background principles of state property and nuisance law. Knowledge and notice of the preexisting regulations may be very fact sensitive. Just compensation, therefore, will be determined not by the property law of the state but instead by what the property owner knew or should have known regarding permissible uses of the property.

Therefore, it will become incumbent upon property owners to make facial challenges to regulations at the date of their adoption. This assumes property owners would have knowledge of the newly adopted regulations and more than a general understanding of their impact upon their property and their rights to transfer property.[26] Indeed, property owners will be required to

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[26] A property owner may be only vaguely aware of the effect of new regulatory enactments. Justice Wesley observed: "If a prior owner cannot transfer a potential taking claim to a subsequent purchaser, then the property's value is destroyed by

engage in legal analysis of the impact of the regulations and make predictions as to how courts may interpret the regulations and their impact upon property ownership and transferability.

Therefore, property owners in Colorado will be faced with of the need to make facial challenges to regulations without any present intent on their part to make use of their property. Ripeness defenses would be expected. The likelihood of success is remote.[27]

Just as private property owners will learn the impact of the notice legal standard, so to will government learn about the impact of the notice standard. Government would be expected to recognize that it can avoid just compensation by regulating uses of property. The more extensive the regulatory framework the more likely it is that a court will hold property owners and purchasers to the notice standard of the Court of Appeals. Therefore,

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the transfer without the government having to pay compensation for it. As suggested by the *Lopes* court in *Lopes*, and as noted in my concurring opinion in *Gazza*, the majority's reasoning effectively forced New York property owners to keep abreast of regulatory enactments and, if the enactment appears to deprive a parcel of its economic value, to seek compensation for the taking." *Annello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 89 N.Y.2d 535, 656 N.Y.S.2d 184, 678 N.E.2d 870, *cert. denied*, 118 S.Ct. 2 (1997) (Wesley, J., dissenting).

[27] *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981). A facial challenge presents no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment of the Surface Mining Act constitutes a taking." *Id.* at 295.

Justice Holmes' comment in *Pennsylvania Coal* that excessive regulation will be a taking will no longer be true. In fact, it will be a shield by government against the necessity of paying just compensation.[28]

If the lower courts can create exceptions like the "notice" exception adopted by the Court of Appeals, then the same exception to the right of just compensation can be adopted for a physical invasion.[29] If the notice of preexisting regulation exception applies to categorical takings and physical invasion takings, then the State will by *ipse dixit* ". . . transform private property into public property without compensation . . . ". *Lucas*, 112 S.Ct. at 2901 (1992) *citing Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

CONCLUSION

The Colorado Court of Appeals' decision deprived Lien of a fundamental right to just compensation. This deprivation occurred because of the Court of Appeals'

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[28] Lien recognizes it is implicit in reading *Lucas* that when less than a categorical deprivation occurs, the establishment of regulations does not necessarily constitute a taking requiring just compensation. See *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). Instead, to determine if a taking occurred, the investment-backed expectation analysis must be followed. *Lucas*, 505 U.S. at 1015.

[29] See for example, *Kim v. City of New York*, referred to at f.n. 12. In *Kim*, approximately 2,400 square feet of her city lot was filled for adjacent support for a road.

apparent disregard for decisions of this Court. The holding of the Court of Appeals is fundamentally in conflict with this Court's holdings in *Lucas* and *Nollan*. In categorical takings cases, a property owner's right to receive just compensation must be determined by examining whether the restrictions imposed are inherent in the title to the property under the governing law of property and nuisance. The restrictions on use inherent in the title to the property derive from the nature of the property itself. They do not change merely because title to the property changes hands. The Colorado courts' approach disregards this fundamental principle and improperly circumvents the approach set forth in *Lucas* and its progeny for categorical takings cases.

For the reasons set forth above, Lien respectfully requests that this Court grant this Petition for Writ of Certiorari to correct the Colorado courts' approach which decided an important federal question in a way that conflicts with decisions of this Court and to resolve the conflict among the states.

Dated: July, 1998

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS — August 28, 1997
No. 96CA0374 — **NOT SELECTED FOR PUBLICATION**

Pete Lien & Sons, Inc., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Plaintiff-Appellant,

v.

The Board of County Commissioners of the County of Larimer, and John Clarke, Janet Duvall and Jim Disney, in their capacities as members of the Board of County Commissioners of Larimer County, Colorado and Janet Duvall, individually,

Defendants-Appellees,

v.

Sandy Flats Defense Coalition, a Colorado nonprofit corporation,

Intervenor-Appellee.

Appeal from the District Court of Larimer County
Honorable William F. Dressel, Judge
No. 95CV101

Division I — JUDGMENTS AFFIRMED
Opinion by JUDGE MARQUEZ
Metzger and Criswell, JJ., concur

Pendleton Friedberg Wilson Hennessey & Meyer, P.C., F. Stephen Collins, Denver, Colorado; Craig D. Grotenhouse, Rapid City, South Dakota, for Plaintiff-Appellant

Harden, Schmidt, Hass, Haag & Hallberg, P.C., George H. Hass, County Attorney, Jeannine S. Haag, Assistant County Attorney, Fort Collins, Colorado, for Defendants.Appellees

Scotty P. Krob, Denver, Colorado, for Intervenor-Appellee

Steven J. Lechner, William Perry Pendley, Denver, Colorado, Amicus Curiae for Mountain States Legal Foundation

Kendor P. Jones, Brian S. Tooley, Denver, Colorado, Amicus Curiae for Union Pacific Resources Group, Inc.

Hall & Evans, L.L.C., Thomas J. Lyons, Josh A. Marks, Andrew D. Ringel, Denver, Colorado, Amicus Curiae for Colorado Counties, Inc.

Plaintiff, Pete Lien & Sons, Inc., d/b/a Colorado Lien Company, appeals the trial court judgment dismissing its C.R.C.P. 106(a)(4) claim for relief from the denial by Larimer County Board of Commissioners (Board) of its application for use by special review of a sandstone quarry, and from a summary judgment dismissing its claims for regulatory taking, declaratory judgment under C.R.C.P. 57, and damages under 42 U.S.C. §1983 (1979). We affirm.

By virtue of a mineral lease and a county permit issued in 1989, plaintiff operates the Weaver Quarry, a sandstone quarry on ten acres in Larimer County. In 1991, plaintiff applied to the Board for permission to expand the Weaver Quarry, but the Board denied the application.

On petition for review pursuant to C.R.C.P. 106(a)(4), the trial court upheld the Board's decision, but ruled that the Board could not prohibit mining on those portions of plaintiff's property that were unpatented federal mining

claims if such prohibition directly conflicted with permission already granted or to be granted by the federal government. That decision was affirmed by a division of this court. *Pete Lien & Sons, Inc. v. Board of County Commissioners,* (Colo. App. No. 93CA1535, Sept. 8, 1994) (not selected for official publication).

After the district court proceedings, the Board asked plaintiff to consider locating an alternative, less obtrusive quarry site. In March 1994, plaintiff entered into a separate mineral lease of a 640-acre area allowing it to mine silica sand. Plaintiff received a reclamation permit to commence mining from the Colorado Mined Land Reclamation Division of the Colorado Department of Natural Resources. Because mining is a use permitted by special review in the O-open zone in Larimer County, plaintiff applied in mid-1994 to the Board for special review to mine sandstone on approximately forty-five acres, the Sandy Flats Quarry, over a 23-28 year period at this location.

Subsequent proceedings focused on the Sandy Flats site, and, upon certain conditions, the Larimer County Planning Department recommended approval of plaintiff's application as to that site. However, February 1995, after a hearing, the Board voted two to one to deny plaintiff's application. Plaintiff's motion for reconsideration was denied.

Plaintiff then filed this action in the trial court seeking review pursuant to C.R.C.P. 106(a)(4), damages for regulatory taking, declaratory relief under C.R.C.P. 57, and damages under 42 U.S.C. §1983. By order dated November 21, 1995, the trial court dismissed the C.R.C.P.

106(a)(4) claim finding that there was competent evidence to support the Board's findings and resolutions.

Pursuant to defendant's motion for summary judgment, the trial court dismissed two of the remaining claims, finding that there was no "taking," and that plaintiff had not pled a 42 U.S.C. §1983 claim. While it initially found there were questions of fact regarding the remaining claims, on a later date the trial court eventually dismissed any remaining claims.

I.

Plaintiff first contends that the trial court erred in finding that the Board's denial of its application for special review was neither arbitrary, capricious, nor an abuse of discretion. We disagree.

C.R.C.P. 106(a)(4) authorizes a district court to grant relief in those instances in which the governmental body exercising quasi-judicial functions "has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." A reviewing court must uphold the decision of the governmental body unless there is no competent evidence in the record to support it. "No competent evidence" means that the decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of power. *Board of County Commissioners v. O'Dell*, 920 P.2d 48 (Colo. 1996).

A decision to deny an application for a special use permit qualifies as a quasi-judicial action under C.R.C.P. 106(a)(4). *Colorado State Board of Land Commissioners v.*

Colorado Mined Land Reclamation Board, 809 P.2d 974 (Colo. 1991).

In a zoning proceeding, a court is not the factfinder and may not substitute its judgment for that of a zoning board where competent evidence exists to support the zoning board's findings. *Board of County Commissioners v. O'Dell, supra.* The reviewing court cannot sit as a super-zoning commission and substitute its zoning decision for that of the zoning board. *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987).

The Larimer County Comprehensive Zoning Resolution provides that:

> A Special Review request use shall be denied if it is found by the Board of County Commissioners that it is probable the proposed use will be contrary to the public interest by being a nuisance, or otherwise by being dangerous, detrimental or injurious to nearby residents, properties, or businesses. Proposed uses found to be contrary to expressed programs of the neighborhood conservation or improvement, either residential or non-residential, may be denied.

The Board made the following relevant findings when denying plaintiff's application:

> 3. The proposed use does not comply with the intent and purposes of the Comprehensive Zoning Resolution and the Comprehensive Land Use Plan.
>
> 4. Surrounding land uses in the area are limited to residences and livestock grazing. The proposal is not harmonious with these uses.

5. The proposed use may have a negative impact on property values in the area.

6. The anticipated timetable for the mining operation is 23-28 years. The long term duration of this project demands heightened scrutiny concerning future impacts.

7. Area residents testified in opposition to the request, describing health hazards of silica sand on humans and animals, possible destruction of historical or archeological sites, and nuisances related to blasting, noise, air pollution, and blowing sand and dust from the quarry operations and truck traffic. The Board finds this testimony meritorious and credible.

. . . .

9. The Zoning Resolution requires denial of a special review application if it is probable the proposed use will be contrary to the public interest by being a nuisance, or otherwise being dangerous, detrimental or injurious to nearby residents, properties or businesses.

. . . .

11. Applicant is currently mining an area known as the Weaver Quarry and has the ability to continue mining that area under its federal mining claims.

Here, there was competent evidence in the record to support the Board's decision. Although plaintiff presented evidence that various state agencies had found that the Sandy Flats proposal complied with the intent and purposes of the comprehensive land use plan, that market values would not likely decrease, and that the proposed quarry posed no significant risk to the public

health, evidence was presented to the contrary as well. For example, although he indicated the quarry would have no adverse impact, plaintiff's real estate appraiser testified that the highest and best use of the land is agricultural. An archeologist predicted that, if mining occurred in the area, significant archeological resources would be uncovered and there would be direct and indirect impacts. There was also evidence that, because of the silica dust the quarry would produce, the quarry could be incompatible with the continuation of farming and ranching in the area. Also, a nutritional immunology specialist and professor of animal sciences testified regarding health risks to animals as a result of silica dust.

Some members of the community voiced concerns that the quarry would create a nuisance, and some complained that the county was compromising the health and safety of the community. One resident testified from personal experience about the effects of blasting; others addressed concerns about noise and increased truck traffic. Certain evidence indicates that the site under review was located in an elevated area subject to high winds. A resident of an area close to the proposed quarry brought two coffee cans full of sand to the hearing and testified that the sand therein had blown onto his neighbor's property from plaintiff's test excavation at sandy Flats. *See Monte Vista Professional Building, Inc. v. City of Monte Vista*, 35 Colo. App. 235, 531 P.2d 400 (1975) (testimony from neighbors and residents, even if unsworn, may be considered).

Accordingly, the record contains sufficient, competent evidence to uphold the Board's decision. *See C & M*

Sand & Gravel v. Board of County Commissioners, 673 P.2d 1013 (Colo. App. 1983).

II.

Plaintiff also contends that the trial court erred in finding that the Board's denial of its application for special review did not amount to a regulatory taking of its property requiring just compensation under both the Colorado and United States Constitutions. We disagree.

Summary judgment is a drastic remedy that is warranted only on a clear showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Greenberg v. Perkins,* 845 P.2d 530 (Colo. 1993).

The party moving for summary judgment bears the burden of establishing the lack of a triable factual issue, and if there are any doubts as to the existence of such an issue, they must be resolved against that party. *Greenberg v. Perkins, supra.* Also, the party opposing summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts contained in the record. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo. 1988).

Appellate review of a judgment granting a motion for summary judgment is *de novo. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board,* 901 P.2d 1251 (Colo. 1995).

A governmental regulation that prohibits all reasonable uses of property constitutes a taking within the meaning of the Fifth Amendment and Colo. Const. art. II,

§10. *Jafay v. Board of County Commissioners,* 848 P.2d 892 (Colo. 1993).

A land-use regulation when applied to a particular property constitutes a taking if it does not substantially advance legitimate state interests or if it prevents economically viable use of the property. However, a landowner is not constitutionally entitled to use his property in a manner that results in the maximum attainable profit. *Van Sickle v. Boyes,* 797 P.2d 1267 (Colo. 1990); *Reale Investments, Inc. v. City of Colorado Springs,* 856 P.2d 91 (Colo. App. 1993).

A regulation can effect a taking if it goes too far. Regulations which compel owners to suffer physical invasion or occupation of their property or which deny owners all economically beneficial or productive use of the land are regulatory takings. *Williams v. City of Central,* 907 P.2d 701 (Colo. App. 1995).

When determining whether a governmental action has gone beyond "regulation" and effects a "taking," we must consider the character of the challenged governmental action, its economic impact, and the extent to which the regulation has interfered with the reasonable investment-backed expectations of the land owner. *State v. The Mill,* 887 P.2d 993 (Colo. 1994); *Williams v. City of Central, supra.*

When the regulated party is on notice of the extent of the government's regulatory authority over its property, then the "reasonable investment-backed expectation" of such party is the dispositive factor in takings analysis. We conclude that this factor is dispositive here. *See State v.*

The Mill, supra (expectations of unregulated use are generally considered unreasonable when an extensive regulatory scheme is in place at the time of the investment).

Plaintiff contends that it has been deprived of its right to extract the silica sand and has thus been denied all economically beneficial productive use of the land. It asserts that it is entitled to just compensation. We disagree.

In *State Department of Health v. The Mill, supra,* plaintiff purchased a 61-acre parcel in 1973 containing uranium mill tailings and a mill yard. In 1983, plaintiff leased the mill yard to a third party for coal storage. The Colorado Department of Health (CDH) met with the parties to discuss certain precautions to avoid the spread of radioactive contamination. When plaintiff failed to comply, CDH advised of such noncompliance by letter and plaintiff lost its lease. In a suit against CDH for regulatory taking, the supreme court determined there was no reasonable investment-backed expectation where plaintiff was on notice that the materials were dangerous and highly regulated.

The regulations at issue here were in effect prior to plaintiff's entry into its present lease arrangement in 1994. Plaintiff has not pointed to any new regulations passed subsequent to its execution of the mineral lease. Plaintiff was aware that mining was permitted at Sandy Flats, an O-open zone, only by special review, and was aware at the time it entered into the lease of the extent of the government's regulatory authority over its property. Plaintiff was not entitled to approval by the Board, especially if the evidence as a whole showed the proposed use

to be inappropriate at that particular site. Thus, any expectation that it would expeditiously be granted a special use was not a reasonable investment-backed expectation. *See State v. The Mill, supra; Williams v. City of Central, supra.*

III.

Plaintiff contends that the trial court erred in granting summary judgment in favor of the Board and Commissioner Duvall on its 42 U.S.C. §1983 claims for violation of its rights to procedural and substantive due process. This claim is based on plaintiff's assertion that Commissioner Duvall has a documented personal conflict with plaintiff by her participation in litigation involving plaintiff in another municipality and her statements in opposition to plaintiff's plant. We conclude that summary judgment was proper.

Under §1983, a plaintiff must prove that "(1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or the laws of the United States." The county is a "person" for purposes of §1983. *County of Adams v. Hibbard,* 918 P.2d 212, 217 (Colo. 1996).

Plaintiff relies on §24-18-109(3), C.R.S. (1988 Repl. Vol. 10A), which provides that a board member with a personal or private interest in any proposal pending before the board shall disclose such interest, shall not vote thereon, and shall refrain from attempting to influence the decisions of the others voting on the matter.

In 1991, Duvall and her husband were two of the named plaintiffs in a lawsuit filed in federal district court alleging that the operation of plaintiff's processing plant in LaPorte, Colorado, created an imminent and substantial endangerment to the public health and environment. In 1993, Plaintiffs voluntarily dismissed this lawsuit two months before trial.

In 1994, Duvall was elected to the Board of County Commissioners. During the Sandy Flats Quarry hearings, Duvall argued against the approval of plaintiff's application.

Although plaintiff knew of Commissioner Duvall's previous actions, it did not initially object to her participation in the special review hearing. Not until after its application had been denied did plaintiff file a motion for reconsideration alleging that Duvall should have recused herself as she had a "personal or private interest" in the application based on her longstanding opposition to the processing plant. Plaintiff attached to its motion for reconsideration and rehearing a copy of one page of the complaint filed in the federal action as well as excerpts from deposition testimony of Duvall from that same litigation. Plaintiff submitted no other affidavits or other evidence to substantiate the allegations of bias.

The Board denied the motion for reconsideration, reasoning that Duvall had neither a financial interest nor a personal interest, and that the denial would not personally benefit Duvall in any way. The Board added that, since plaintiff was fully aware at the time of the hearing of the facts which it was asserting constitute a conflict of

interest, its failure to raise this issue at the beginning of the hearing constituted a waiver.

Inasmuch as it was directly sued by Duvall in a lawsuit regarding its business, plaintiff knew of her position prior to the start of the hearing on the Sandy Flats application. Further, plaintiff did not move to have Duvall disqualified, nor did it mention the possible bias until after the Board issued its decision. Thus, even if plaintiff established a policy or custom for purposes of 42 U.S.C. §1983, by delaying and failing to follow proper procedures, plaintiff made a tactical choice and waived whatever objection it may have had to Duvall's participation in this case. *See Mountain States Telephone & Telegraph Co. v. Public Utilities Commission*, 763 P.2d 1020 (Colo. 1988); *McClellan v. State*, 731 P.2d 769 (Colo. App. 1986) (failure to raise issue of bias in administrative hearing waives objection).

We also reject plaintiff's contention that Duvall's participation in and influence on the Board's consideration of its application for use by special review violated its substantive due process rights.

Substantive due process bars "arbitrary, capricious, or irrational" governmental action. Since zoning decisions are quasi-judicial, the governmental action will not be found to be arbitrary, capricious, or irrational unless no articulated basis for the decision bears any rational relationship to a legitimate state interest. *Sundheim v. Board of County Commissioners*, 904 P.2d 1337 (Colo. App. 1995).

As discussed above, the basis for the denial of the special review permit here bears a rational relationship to

a governmental interest. *See C & M Sand & Gravel v. Board of County Commissioners, supra.*

Additionally, because an application needs a majority vote from the board to pass, even if Duvall had been recused, plaintiff's application would not necessarily have been successful. *See* §1-4.205(2), C.R.S. (1996 Cum. Supp.) (boards of county commissioners consist of three members, two of whom constitute a quorum); *Kinder-Care Learning Centers, Inc. v. Board of Adjustment,* 721 P.2d 162 (Colo. App. 1986) (even without an allegedly prejudiced board member's vote, plaintiff's appeal from the zoning administrator's order would be denied for failure to obtain a concurring vote from the Board of Adjustment). Thus, there was no denial of substantive due process. Plaintiff also contends that Duvall's participation, in and of itself, is sufficient to establish personal liability in a §1983 action. However, we agree with defendant that qualified immunity bars this claim.

The doctrine of qualified immunity protects public officials from individual liability in a §1983 action unless the officials violated clearly established constitutional rights of which a reasonable person would have known. *Workman v. Jordan,* 32 F.3d 475 (10th Cir. 1994).

Claims of qualified immunity are analyzed under a two-part framework. The court first determines whether the plaintiff demonstrated that defendant's actions violated a federal constitutional or statutory right. Then, the court assesses whether that right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right.

Liebson v. New Mexico Corrections Department, 73 F.3d 274 (10th Cir. 1996).

In our view, Duvall's conduct did not constitute due process violation or violate a federal constitutional right. Additionally, in light of the information presented at the hearing, Duvall's actions were objectively reasonable. *See Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action).

The judgments are affirmed.

JUDGE METZGER and JUDGE CRISWELL concur.

APPENDIX B

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 96CA374

ORDER

PETE LIEN & SONS, INC. V BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER V SANDY FLATS DEFENSE COALITION

Upon consideration of the Petition for Rehearing filed by Plaintiff/Appellant herein, the Petition is hereby DENIED. JUDGE METZGER WOULD GRANT. It is ordered that issuance of the Mandate is stayed to and including November 24, 1997, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

[Seal]

Marquez, J.
Metzger, J.
Criswell, J.

DATED: OCTOBER 23, 1997

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC871
CERTIORARI TO THE COLORADO COURT OF APPEALS, 96CA0374
DISTRICT COURT, LARIMER COUNTY, 95CV101

ORDER OF COURT

PETE LIEN & SONS, INC., a South Dakota Corporation doing business in Colorado as COLORADO LIEN COMPANY,

Petitioner,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL and JIM DISNEY, in their capacities as members of the Board of County Commissioners of Larimer County, Colorado; and JANET DUVALL, individually,

Respondents,

v.

SANDY FLATS DEFENSE COALITION, a Colorado nonprofit corporation,

Intervenor.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 20, 1998.

[Seal]

JUSTICE KOURLIS would grant as to the following issues:

Did the court of appeals err in holding that the defendant's action, which deprived Lien of any use of its severed mineral interest, did not constitute a taking which required just compensation under the United States and Colorado Constitutions?

Did the court of appeals err in basing its conclusion that there was not a compensable taking on the Board's finding that the proposed use might constitute a nuisance in the future?

APPENDIX D

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO

CASE NUMBER 95 CV 101 – 2

FINDINGS AND ORDER: DEFENDANTS' SUMMARY JUDGMENT/STATUS

PETE LIEN & SONS, INC., a South Dakota Corporation doing business in Colorado as COLORADO LIEN COMPANY,

Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, and JOHN CLARKE, JANET DUVALL and JIM DISNEY, in their capacities as members of the Board of County Commissioners of Larimer County, Colorado, and Janet Duvall, individually,

Defendants.

This Court, having previously issued a separate order on plaintiff's Rule 106 claim leaving for determination defendants' summary judgment motion and the setting of a status hearing, whereby the Court makes the following findings and orders:

I. DEFENDANTS' SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment addresses the second, third, and fourth claims for relief of plaintiff's amended complaint.

Plaintiff's second claim for relief alleges that the action of the defendant Board of County Commissioners denying its application for use by review is a taking of its rights to the mineral release it obtained for the property. Based upon the uncontradicted facts and applicable law, the Court finds that granting of summary judgment while a drastic remedy is appropriate. Plaintiff obtained the mineral lease which in and of itself gave it no right to extract minerals. Plaintiff based upon its previous application to the Larimer County Board of Commissioners was fully aware that it had to obtain permission from the Board of County Commissioners to obtain the benefits of any mineral lease. There was no taking, but an exercise of its authority by the Board of County Commissioners. Therefore, the Court dismisses plaintiff's second claim for relief.

Plaintiff's third claim for relief alleges that the action of the defendant Board of County Commissioners in denying plaintiff's application "was not reasonably or rationally related to the public health, safety, morals or general welfare." This allegation is similar if not identical to the issues raised in the first claim seeking Rule 106 relief. There appear to be two additional arguments asserted by the plaintiff (1) prior action of the Larimer County Board of Commissioners allowing development in proximity to commercial mineral deposits the Board violated 34-1-305 C.R.S. and (2) the participation of Commissioner Duvall denied plaintiff of a fair and impartial hearing or its constitutional right of procedural due process. The Court finds that there are questions of law and fact related to this allegation whereby summary judgment

would not be appropriate on plaintiff's third claim for relief and plaintiff's motion is therefore denied.

Plaintiff's fourth claim for relief is based upon 42 U.S.C. Section 1983 and allegations once again regarding the participation of Commissioner Duvall in the consideration of its application for review. The Court agrees with the argument of the defendants that the plaintiff has not sufficiently pled a claim to be entitled to relief pursuant to Section 1983. A Section 1983 claim against a governmental entity such as the Board of County Commissioners must allege that official policy, custom, etc., is responsible for deprivation of rights protected by the constitution. Plaintiff simply alleges that the participation of Commissioner Duvall:

> . . . establishes a county policy of allowing participation by a county commissioner, who has a personal interest or private interest in a manner contrary to Section 24-18-109(3)(a) C.R.S.

Plaintiff has not pled fact or a violation of law that would support a Section 1983 claim. At most plaintiff has alleged an inappropriate act on the part of a commissioner and the failure of the other two commissioners to intervene in the matter then pending before them for decision. There has not been pled existence of a policy, custom or other factual basis that would arise to a Section 1983 claim. Therefore, plaintiff's fourth claim for relief based on Section 1983 is dismissed.

BY THE COURT this 29 day of November, 1995, with Status Conference 12-19-95 at 11:30 p.m.

/s/ William F. Dressel
WILLIAM F. DRESSEL
District Court Judge

CERTIFICATE OF MAILING

This is to certify that on the 29th day of November, 1995, a true and correct copy of the above and foregoing Order was delivered to the attorney of record and parties appearing pro se in the following manner:

For counsel in Fort Collins, who have agreed to such procedure: by placing said copy in the attorney's pick-up box located in the Larimer County Courthouse, 200 West Oak, Fort Collins, Colorado.

For all other counsel, or parties appearing pro se: deposited in the United States Mail with the correct postage affixed thereon.

/s/ Marilyn W. Scheinost

(2)

No. 98-102

FILED
SEP 11 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

Does a county's denial of a mining permit under its zoning regulation constitute a categorical taking under the Fifth Amendment to the United States Constitution where: (1) the county denied the applicant's request to mine only one mineral of a severed mineral estate; and (2) the applicant proposed alternative locations and asked the county to select one of two quarries?

Where a county's denial of a mining permit under its zoning regulation does not constitute a categorical taking under the Fifth Amendment to the United States Constitution, may a court properly consider whether the applicant was on notice of the county's regulatory scheme and therefore had no reasonable investment-backed expectation in deciding whether a taking has occurred?

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STATEMENT OF THE CASE

Article 28 of Title 30, C.R.S. 1973 empowers counties to adopt zoning regulations, including classifying land uses, for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state. Section 30-28-111 and 115 C.R.S. 1973.

Pursuant to this statutory authority, Larimer County, Colorado, enacted a Comprehensive Zoning Resolution and established zoning districts. The Resolution lists uses for each district which are permitted outright and lists other uses which are permitted by special review. Because special review uses are generally more adverse to the surrounding area, the Board of County Commissioners ("County Board") may approve such uses only after a public hearing.

The special review procedures allow the County Board to consider such uses in detail. The Zoning Resolution lists the following eight factors which the County Board must consider when deciding whether to grant a special review use:

1. Whether the proposal complies with the intent and purposes of the Resolution, and whether it complies with the intent and purposes of any comprehensive plan enacted by a governmental authority affecting the property in question.

2. Whether or not the proposal is harmonious with the surrounding neighborhood.

3. The general effect the proposal may have on the neighborhood.

4. The general effect the proposal may have on property values.

5. Whether or not the proposal would impair the public health, welfare, prosperity and safety by creating undesirable traffic congestion, undesirable sanitary conditions, overburdening of utilities or adverse environmental influences in the area.

6. The recommendation, if any, from an appropriate planning or other agency of a governmental unit near the property in question.

7. The anticipated time table for completion of the proposed use.

8. Whether or not the procedural requirements for reviewing special review items have been complied with.

The County Board **must** deny a special review use if it finds it is probable that the proposed use will be contrary to the public interest by being a nuisance, or otherwise by being dangerous, detrimental or injurious to nearby residences, properties, or businesses. The County Board **may** deny a special review use if it finds the proposed use is contrary to expressed programs of neighborhood conservation or improvement, either residential or non-residential.

In May 1989, Pete Lien & Sons, Inc. ("Lien") applied to the County Board to operate a silica sandstone quarry ("the Weaver Quarry") on ten acres in Larimer County. The Weaver Quarry is located in the O-Open Zone. Mining is a special review use in the O-Open Zone. The County Board approved Lien's application.

In 1991, Lien applied to expand the Weaver Quarry to mine an additional 39 acres. The 39 acres included unpatented federal mining claims. The County Board denied Lien's application to expand because the quarry would have an adverse visual impact on the foothills.

Lien appealed the County Board's decision to the state district court. Lien contended, in part, that the County Board had no authority to prohibit it from mining the area upon which federal minerals were located because the Federal Mining Law of 1872 preempted local regulations. The state district court agreed and the Colorado Court of Appeals affirmed the district court's decision as to the federal mineral issue in an unpublished opinion.

In 1994, Lien entered into a lease with Rock Springs Royalty Company. Rock Springs is the owner of the entire mineral estate in 640 acres of land in the O-Open Zone known as Sandy Flats. The lease however, allowed Lien to mine only one mineral within the mineral estate – silica sandstone.

Lien applied to the County Board for a special review permit to mine the sandstone at Sandy Flats on 45 acres over a period of 23-28 years. The County Board considered the application at a public hearing and denied the application. The Sandy Flats application is the subject of this petition.

Sam Lien, Lien's president and general manager, testified at the public hearing that Lien proposed to mine Sandy Flats in response to the prior County Board's suggestion that Lien look for an alternative quarry site which would be less visible than Weaver. Sam Lien further

testified that if the County Board approved Sandy Flats, Lien would close Weaver within the following year; if the County Board did not approve Sandy Flats, Lien would continue to operate Weaver:

> It all comes back, in my mind, to the issue that there's a choice to be made tonight around opening up a new quarry at Weaver this summer or a new quarry at Sandy Flats and reclaiming Weaver.
>
> I've honored my word to the Commission to present this alternative, and I've tried to do my best to make it as easy as possible on our neighbors at Sandy Flats, and I'm asking you tonight which choice is to be made.

Many area residents appeared and testified in opposition to Sandy Flats. Residents clearly preferred Lien remain at the existing Weaver Quarry rather than opening an entirely new quarry at Sandy Flats.

When the County Board denied Sandy Flats, it responded to Lien's request that the Board choose one site where Lien should mine. By its decision, the County Board told Lien it should remain at the Weaver site rather than opening a new site at Sandy Flats.

Lien appealed the County Board's denial to the state district court and Court of Appeals. Lien claimed, *inter alia*, that the County Board's denial constituted a taking of Lien's property in violation of the Colorado and United States Constitutions. Both Courts, relying on well-settled law, rejected Lien's takings claim. The Colorado

Supreme Court denied certiorari review of Lien's takings claim.

ARGUMENT

I. THE COLORADO COURT OF APPEAL'S DECISION IS CONSISTENT WITH UNITED STATES SUPREME COURT DECISIONS.

A. Lien has not suffered a categorical taking and *Lucas* is inapplicable.

The threshold question to be answered before *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), can be applied is whether a categorical taking has occurred. *Lucas* describes two instances where a categorical taking occurs: (1) where a regulation compels the property owner to suffer a physical invasion of his property; and (2) where a regulation denies a property owner of all economically beneficial or productive use of his land, unless the proscribed use was not part of the property owner's title to begin with.

Lien inaccurately describes its property interest as "a severed mineral estate," (Petition, page 4), and then argues that denial of the Sandy Flats application was a categorical taking of the entire mineral estate. Lien's claim that the County Board's denial of its special review application to mine silica sand is a categorical taking is wrong for a number of reasons.

First, Lien's property interest is comprised of a lease to mine only one mineral in the entire mineral estate. All

other minerals and hydrocarbons are unaffected by the county action under review.[1]

Second, Lien's application is to mine forty-five acres out of a six hundred forty acre severed mineral estate. The remaining five hundred ninety-five acres are unaffected by the action under review.

Third, Lien's application was to mine silica sand on either Sandy Flats or the Weaver quarry. Lien intended to mine but a single quarry. Lien's intention has not been thwarted by the action under review.

Finally, the denial of Lien's Sandy Flats application speaks as of the time of the decision. There is no prejudice to future applications should other uses, roads, or other conditions in the area change to justify a different result.

This Court can only consider Lien's categorical taking claim if Lien is allowed to separate the total severed mineral estate into discrete parts, accompanied by the determination that a single discrete part has been taken. This Court has soundly rejected this reasoning.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court clarified it was appropriate to consider the entire property. In response to the appellants' argument New York City's landmarks ordinance took their rights to the superadjacent air space above Grand Central Station, this Court stated:

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[1] The record is void of any evidence that other minerals and hydrocarbons contained within the mineral estate cannot be mined.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and the nature and extent of the interference with the rights in the parcel as a whole – here, the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130-31.

Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court recognized, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Id.* at 497 (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)). In applying this principle in *Keystone*, this Court specifically rejected the contention the regulation entirely destroyed the petitioner's interest in Pennsylvania's unique support estate. *Id.* at 498-99. "It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500.

Subsequent to *Lucas*, this Court reaffirmed the principle that the entire property must be considered to determine if a taking has occurred. In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for*

Southern California, 508 U.S. 602 (1993), this Court rejected an attempt to "shoehorn its claim into [*Lucas*' total takings] analysis by asserting that '[t]he property of [Concrete Pipe] which is taken, is taken in its entirety.' " *Id.* at 643-44. After noting it had previously rejected this analytical framework in both *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court declared:

> To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question."

Concrete Pipe, 508 U.S. at 644.

The denominator being the entire property interest, and not a discrete part, is firmly settled in all courts.[2]

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[2] See, e.g. *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (in rejecting takings analysis narrowly focused on the right to hunt, the court noted, "we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land."); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority."); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430 (10th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 951 (1987) ("in determining whether a particular land-use regulation deprives a property owner of the 'economically viable use' of his land, the court must examine the impact of the regulation on the property as a

Certiorari need not be granted to further explain this issue. Consistent with this Court's decisions, Colorado courts hold that parcels of property cannot be divided into individual strands in the bundle of property rights for takings analysis.[3]

Once the proper denominator is used, this becomes a relatively simply analysis. The denominator is the property as a whole including both the surface and subsurface estates.[4] Even if a severed mineral estate can be deemed to be the property interest for takings analysis, Lien's

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whole."); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985) ("[i]t is well settled that taking jurisdiction does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated.").

[3] In *Central Colorado Water Conservancy District v. Simpson, State Engineer*, 877 P.2d 335 (Colo. 1994), the court, citing *Penn Central* and *Keystone*, concluded, "to determine whether a taking has occurred for purposes of federal takings analysis, the impact on the challenged action on the property as a whole must be considered." 877 P.2d at 347. The Colorado Court of Appeals in *Williams v. City of Central*, 907 P.2d 701, 704 (Colo. App. 1995), described its takings analysis as follows:

> Generally, to determine whether there has been a denial of all use of a landowner's property, a court must compare the value that has been taken from the property to that which remains; the interference with rights in the discrete segment of the property affected is measured against the value of the property as a whole.

[4] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court refused to consider the right of support, a separate property interest under Pennsylvania law, as a separate property interest for a taking claim.

property interest is only one segment in the mineral estate. The County Board's denial of Lien's special review application only precludes Lien from mining one mineral in an area comprising less than ten percent of the total severed mineral estate under the specific terms of the particular mining plan presented for the County Board's consideration.

The land use decision at issue here focused only on the adverse impacts of Lien's proposal. On the other hand, the land use decision in the typical takings case (wetlands for example) is intended to permanently preserve the property interest at issue for a public benefit (wetlands not being destroyed through development). Because the action under review here is without prejudice to a future application, no permanent taking in the wetlands sense has occurred here.

B. Knowledge of the County Board's regulatory authority is relevant to whether Lien had a reasonable investment-backed expectation.

Having established that Lien's claim does not fall within the *Lucas* total takings categorical rule, the traditional ad-hoc, multi-factorial factual inquiry analysis applies. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Among the factors considered by this Court and federal and state courts in this ad-hoc analysis are the character of the governmental action, its economic impact, and the extent to which the government action interfered with a property owner's reasonable investment-backed expectation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S.

177, 190-91 (1985). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This Court has held that the force of the third factor – the property owner's reasonable investment-backed expectation may be "so overwhelming . . . that it disposes of the takings questions." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Whether a property owner is on notice of the extent of the government's regulatory authority over its property is directly relevant to whether the property owner's expectations were reasonable. *Monsanto*, 467 U.S. at 1006 (no reasonable investment-backed expectations that data submitted to EPA would be kept confidential because Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration).[5]

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[5] *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454-455 (2d Cir. 1995) (no reasonable investment-backed expectation existed when company continued as an insured depository institution subject to new federal law on cross-guarantee liability); *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1072, *cert. denied*, 513 U.S. 961 (1994) (highly regulated nature of the banking industry dispositive of the taking issue); *Kesserling v. F/T Arctic Hero*, 30 F.3d 1123, 1126 (9th Cir. 1994) (judicial enforcement of crewperson's wage liens did not interfere with the owner/lessor of the vessel's fishing equipment's reasonable investment-backed expectations because owner presumed to have knowledge third-party equipment was subject to maritime liens); *California Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 916 (1992) (no taking present based on lack of reasonable investment-backed expectations of savings and loan owner because of the applicable regulatory regime).

The Colorado Supreme Court and Colorado Court of Appeals have followed the United States Supreme Court in adopting a similar rule concerning the investment-backed expectations of property holders for ad-hoc takings analysis. In *State Department of Health v. The Mill*, 877 P.2d 993 (Colo. 1994), the Colorado Supreme Court addressed whether the applicable federal and state regulations' restrictions on a former uranium mine and mill tailings storage site constituted a regulatory taking. In analyzing the issue, the court stated, "[t]he 'reasonable investment-backed expectations' of the regulated party is the dispositive factor in takings analysis when the regulated party is 'on notice' of the extent of the government's regulatory authority over the property." *The Mill*, 887 P.2d at 1000. A property holder's "expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment." *Id.* Ultimately, the court held no taking had occurred because the owner's expectations for using its property were unreasonable. *Id.* at 1002.

Following *The Mill*, the Colorado Court of Appeals has applied this rule in the context of a zoning ordinance which required special review for certain uses. In *Williams v. City of Central*, 907 P.2d 701 (Colo. App. 1995), the landholder alleged he suffered a temporary taking when the city enacted a development moratorium and suspended his application for a special review permit required for him to conduct limited stakes gambling on his property. 907 P.2d at 702-03. In analyzing the takings claim, the court discussed the impact of Williams' notice of the city's zoning ordinances. The court concluded he was "on notice" his property "was subject to special use

review and approval in the discretion of Central City." *Id.* at 707. Further, "[h]e was also 'on notice' that all other commercial uses were subject to the special review process." *Id.* As a result of this knowledge, the court concluded any expectation a special review permit would be granted was not a reasonable investment-backed expectation. *Id.* Instead, the court found "the intended ultimate use of limited stakes gambling was speculative at best." *Id.*

Consistent with the decisions of this Court and prior Colorado decisions, the Colorado Court of Appeals correctly held that Lien's knowledge of the County's special review regulations disposed of Lien's takings claim under an ad-hoc analysis.

The authorities Lien cites in support of the position that prior notice is not a consideration all relate to categorical takings situations. *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (Fla. App. 1992) (owner left with no viable use of land, use of land was limited to recreation or "just looking at it."); *Lopes v. City of Peabody*, 417 Mass. 299 (1994), 629 N.E.2d 1312 (Mass. 1994) (all economically viable use eliminated because of wetlands); *Moroney v. Borough of Old Tappan*, 633 A.2d 1045 (N.J. App. 1993) (denial of right to build home deprived owner of all economic use of property. The analysis is fact intensive and burden of showing no economic use lies with landowner. Court specifically upheld the use of reasonable investment-backed expectation criteria when no categorical taking has occurred); *K&K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996) (all economic use destroyed because of refusal of a wetlands fill permit.);

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (taking of a reversionary interest in a railroad easement under Rails-to-Trails act is a total taking).

By definition, the traditional ad-hoc, multifactorial, factual inquiry applicable to noncategorical takings cases like this one involves a case-by-case determination. This may lead to differing outcomes depending on the facts of the case and the weight given by a particular court to each of the applicable factors (i.e., the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations). Such differing outcomes by courts of various states is consistent with the United States Supreme Court's pronouncement that "[i]n 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad-hoc, factual inquiries.' " *Lucas*, 505 U.S. 1003 at 1015.

II. REASONS FOR DENYING THE WRIT

This case is not worthy of certiorari review by this Court. The law is well settled that a categorical taking occurs only when a regulation denies a property owner all economically viable use of his property and that a property cannot be split into discrete segments for takings analysis. This is not a categorical takings case and the Court need not revisit this issue.

Because this is not a categorical takings case, the Colorado Court of Appeals, consistent with federal and state law, applied the ad-hoc, multifactorial factual inquiry. The Court properly held that Lien could not have

a reasonable investment-backed expectation to mine silica sand in light of the County's discretionary special review process.

The County's denial of Lien's application was a fact intensive proceeding based on a proposal to mine at a particular location in a particular method. The County Board determined this proposal to be against the health, safety and welfare of its citizens. Lien asked the County Board to choose one site – the Weaver quarry or Sandy Flats quarry. The County Board chose Weaver. The qualified nature of Lien's application precludes Lien from asserting a takings claim. The unique facts of this case mean that if certiorari were granted, any rule of law would be of little precedential value.

CONCLUSION

For the reasons given above, Lien's petition for certiorari should be denied.

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No. 98-102

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Respondent/Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

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QUESTION PRESENTED FOR REVIEW

Where a mining company leases the right to mine a single substance in a subsurface estate, knowing that the exploitation of that limited interest requires the prior approval of the County, can the mining company claim a categorical taking, if the County denies the mining company's request to mine?

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STATEMENT OF THE CASE

The Sandy Flats Defense Coalition ("the Coalition") is comprised of people who live near the site of the proposed Sandy Flats silica sand mine, that is the central focus of this case. They are the people most directly affected by the decisions involved in this controversy. The Coalition includes individuals who spoke in opposition to the application of Pete Lien & Sons, Inc. ("the Mining Company") at the public hearing before the Larimer County Board of County Commissioners ("the County"), as well as others who oppose the application. Many members of the Coalition and their families have lived and ranched in the Sandy Flats area for generations and intend to continue to do so for generations to come. Needless to say, this Court's decision is of critical importance to the Coalition's members, as it is they who will, literally, have to live with it.

In general, the Coalition agrees with and adopts the Statement of the Case provided in the Brief in Opposition filed by the Respondent County. In addition, the Court should know the following, all of which is undisputed and well-supported by the record.

Pursuant to a 1994 lease agreement with Rock Springs Royalty Company, the Mining Company acquired a narrowly limited interest in the mineral estate of certain property. It acquired a lease that permitted it to mine a single mineral – silica sand. At the time it acquired its interest, the Mining Company knew it could not exploit that interest without the approval of the County, acting through the Board of County Commissioners. After the Mining Company submitted its application to the County,

the Commissioners held a public hearing on the matter. That hearing began the evening of February 6, 1995. The hearing continued for several hours, with extensive presentations being made by the Mining Company and members of the Coalition. The Coalition, appearing without counsel, provided evidence that the proposal was for an open pit mining operation; that the substance to be mined, silica sand, is very fine and easily blows in the wind; that the area where the open pit was proposed is continuously subject to high winds; that as a result of just the test hole blasted by the Mining Company adjoining landowners could scoop up silica sand dust that had blown onto their property by the hand full; that such blowing silica sand dust may cause health problems for humans and livestock in the area; and that matters associated with operating the mine would have substantial adverse impacts on the area, including shaking residences when blasting occurs, and substantially increasing truck hauling on narrow, unpaved county roads. The mining company also provided a full and complete presentation to the Commission, including statements by several expert witnesses. In the early morning hours of February 7, 1995, the Commissioners voted 2 to 1, to deny the Mining Company's application. The Commissioners' decision was affirmed following an appeal to the District Court of Larimer County, Colorado, on November 29, 1995 and then by the Colorado Court of Appeals on August 28, 1997. The Mining Company's petition for certiorari was denied by the Colorado Supreme Court on April 20, 1998. The Mining Company now seeks review on certiorari by the United States Supreme Court.

ARGUMENT

I. THE CONSTITUTIONAL ISSUES RAISED BY THE MINING COMPANY ARE IDENTICAL TO THOSE RESOLVED IN THE *PENN CENTRAL* CASE WHICH DEMONSTRATES THERE WAS NO CATEGORICAL TAKING OF PROPERTY FROM THE MINING COMPANY

The Mining Company's entire argument that certiorari should be granted is based on its conclusion that this case involves what it characterizes as a "categorical taking." If governmental action rises to the level of a "categorical taking" then, according to the Mining Company, no ad hoc analysis into the governmental interests involved is required. A taking has occurred and the government must pay compensation. This Court has previously held that what the Mining Company characterizes as a "categorical taking" occurs in only two circumstances: Where there has been a physical invasion of the property by the government, or where the government's action has deprived the property owner of all economically beneficial or productive use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 198 (1992). The Mining Company does not claim the County physically invaded its property. The sole basis for the Mining Company's claim is that by denying the Mining Company's application for an open pit silica sand mine, the County deprived the Mining Company of all beneficial or productive use of its property.

The fundamental flaw in the Mining Company's argument is that, as a matter of law resulting from the

prior decisions of this Court, depriving the Mining Company from exploiting one element of the subsurface estate using an open pit mine does not constitute a categorical taking. The issue presented by this case was previously presented to and thoroughly addressed by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed 2d 631 (1978).

A. The County's Denial Of The Mining Company's Application To Mine Silica Sand From An Open Pit Was Not A Categorical Taking Of The Mining Company's Property

As the Court may recall, Penn Central owned Grand Central Terminal which was designated a Historic Landmark under New York City's historic preservation ordinance. Such designation restricted the owner's use of the property and required approval of plans affecting the building by the Landmarks Preservation Commission. As the owner Penn Central divided the property into a surface estate and an above-surface estate, which is referred to in the opinion as "superadjacent airspace." Penn Central then entered into a renewable 50-year lease and sublease agreement of the severed above-surface estate with UGP Properties, Inc. UGP and Penn Central sought approval to build a 50 story office building over and above the Terminal but leaving the Terminal unharmed. The Commission denied UGP's request. Penn Central and UGP filed suit claiming they had been completely deprived of their above-surface estate and as such had suffered a "taking" under the 5th and 14th Amendments.

Although two issues were raised by Penn Central, this Court held that it need only address the first:

> Whether restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment.

98 S.Ct. at 2658

The arguments raised by Penn Central were the same as the Mining Company seeks to argue in this case. Penn Central argued:

> [t]he Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

98 S.Ct. at 2662

In the present case the Mining Company seeks to argue that the County has deprived them of any gainful use of their subsurface rights, irrespective of the value of the remainder of the subsurface estate or the surface estate, thus entitling them to just compensation. (See Petition, pp. 12-15)

In rejecting Penn Central's claim, this Court made two things perfectly clear. First, in considering takings claims, property must be considered as a whole. A takings claim cannot be created by dividing up the bundle of

sticks commonly viewed as constituting ownership of property. At page 2662, the *Penn Central* Court held:

> The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, . . . but also approving those prohibiting both the subjacent . . . and the lateral . . . development of particular parcels. *"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here the city tax block designated as the "landmark site." (emphasis added)

The property in question must be considered as a whole and the same is true whether the part that is sought to be separated out is above the surface or below the surface. This limitation is particularly applicable to the Mining Company that seeks not only to separate out the subsurface estate, but attempts to base its claim on its inability to develop only one element of that subsurface estate. If all the airspace development rights above Grand Central Station are not a sufficient separate interest to support a takings claim, then certainly the subsurface development rights for silica sand below the property involved in this case is insufficient as well.

B. The Mining Company's Loss Of, At Most, One Stick From The Ownership Bundle, Does Not Constitute A Taking

In addition to holding that the property must be considered as a whole, the Court in *Penn Central* also held that when all that is lost as a result of the governmental action is one stick from the bundle of property rights, there is no taking. The Landmark Commission's denial of the specific proposal put forth by Penn Central did not constitute elimination of all value of the above-surface estate:

> Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal . . . First, it simply cannot be maintained, on this record that appellants have been prohibited from occupying any portion of the airspace above the terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. . . .

98 S.Ct. at 2665

The fact that the County denied the Mining Company's proposal to create a large open pit mine to extract a very fine, easily windblown material in an area regularly subject to high winds is no indication, (and there is nothing in the record to suggest) that the Commission would preclude the mining of other substances in the property or the use of other, less noxious methods. All

the Mining Company has lost is the ability to mine silica sand through an open pit operation. This can be characterized, at most, as the loss of a single stick in the bundle, which does not constitute a taking. *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

The fact that the Mining Company voluntarily contracted to obtain only this one stick, does not elevate its loss from an appropriate governmental regulation to an unconstitutional taking. This concept, that takings claims are not created by splitting off limited interests in property, was reiterated by this Court a decade after *Penn Central*, in *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232, 480 U.S. 470, 94 L.Ed.2d 472 (1987). In addressing whether Pennsylvania's Subsidence Act constituted a taking of coal, the Court held:

> . . . Petitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use. They advance two alternative ways of carving their property in order to reach this conclusion. First, they focus on the specific tons of coal that they must leave in the ground under the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined. Second, they contend that the Commonwealth has taken their separate legal interests in property – the "support estate."
>
> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of

property "whose value is to furnish the denominator of the fraction."

Keystone at 1248

In the present case, the mining company cannot create a takings claim by obtaining only a limited interest in a portion of the mineral estate. If the mining company's interest is a separate estate for takings purposes, then an owner of real property can create an assurance that a right on review becomes an absolute use by right, or assert a takings claim – merely based on how they divide up their bundle. This is precisely what this Court has previously determined **cannot** be done. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). At page 2290 the Court held:

> While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," . . . we rejected this analysis years ago in *Penn Central Transp. Co. v. New York City* . . . , where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis*. (citation omitted).

This Court has recognized the evil that would result from allowing the division of property interests in the

manner sought by the Mining Company. Every regulation could be converted to a categorical taking simply by splitting off the interest that is being regulated from the rest of the property. In *Keystone*, this Court held:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.

Keystone at 1248

The difference between *Penn Central* and this case is that *Penn Central* involved a separate interest above the surface, while this case involves a separate interest below the surface. *Penn Central* clearly held that above-surface rights are not separate interests for "takings" purposes. The Mining Company has provided no basis for treating its subsurface interests different from Penn Central's above-surface interests. There is no new issue here, and certiorari should be denied.

II. THE MINING COMPANY KNEW THE INTEREST IT OBTAINED WAS CONTINGENT IN NATURE, AND THE MINING COMPANY COULD EASILY HAVE PROTECTED ITSELF AGAINST THE INJURY IT NOW CLAIMS

This outcome is particularly appropriate where, as here, the Mining Company knew at the time it acquired its interest, that their ability to use that interest was contingent upon the County's approval of their proposed mining operation. The entire problem faced by the Mining Company would easily have been avoided. All the Mining Company needed to do was make the lease with Rock Springs Royalty Company contingent upon obtaining the County's approval of their mining proposal. Having failed to take this simple, adequate precaution, the Mining Company must be deemed to have assumed the risk that the County might deny their application. See *Salsberry v. District of Columbia Board of Zoning*, 357 A.2d 402 (D.C. App. 1976) (hardship stemmed from Petitioner's contracting to purchase the property without conditioning the contract on the securing of a variance.)

III. THE CATEGORICAL TAKINGS CASES RELIED ON BY THE MINING COMPANY ARE NOT RELEVANT TO THIS CASE

The foregoing discussions and the holdings of this Court in *Penn Central*, *Keystone*, and *Concrete Pipe* make it clear that this is not a categorical takings case. Accordingly, the Mining Company's discussion of categorical takings cases such as *Lucas* and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) is simply not applicable to the present case.

Likewise, the Mining Company's concern that Colorado and other states may have different understandings of categorical takings are irrelevant because this is not a categorical takings case.

IV. CONCLUSION

The bottom line is that the Mining Company got exactly what it bargained for. It did not buy the property involved in this case. It did not even buy all of the mineral estate. It purchased a specific interest, and it knew its interest could only be exercised with the County's approval. After an extensive hearing, for reasons well supported by the evidence and not challenged by the Mining Company in its Petition, the County denied the Mining Company's request for an open pit silica sand mine. At most, one stick in the bundle associated with the property has been eliminated. No categorical taking of the entire property has occurred. All issues involved were considered and decided by this Court in *Penn Central*. For the reasons set forth above, as well as those contained in the County's Brief in Opposition, certiorari should be denied.

Dated: September 14, 1998

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THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Intervenor.

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ARGUMENT

I. BOARD AND INTERVENORS INCORRECTLY CONCLUDE THAT DENIAL OF USE ON REVIEW BY BOARD WAS NOT A CATEGORICAL TAKING OF ALL INTEREST IN THE LEASE OF A SEVERED MINERAL ESTATE

Board and Intervenor both argue in opposition to Lien's Petition that Board's denial of Lien's application for special review to mine was not a categorical taking. (See generally Bd. Opp. Cert. 5-10, Intervenor Opp. Cert. 3-10). In making this argument, both Board and Intervenor rely upon assumed facts which are not in the record.

For example, Board first argues that Lien's property interest comprises only one mineral in the mineral estate and that " . . . other minerals and hydrocarbons are unaffected by the county action under review".[1] (Bd. Opp. Cert. 5, 6). Likewise, Intervenor makes a similar argument by suggesting that depriving Lien of the right to mine sand is a denial of only one stick in the bundle of rights. (Intervenor Opp. Cert. 4-6). To advance these arguments, both Board and Intervenor assume facts which are not in the record. There are no facts in the record that other minerals or hydrocarbons are found on the land subject to the mineral lease. Indeed, the record

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[1] Board suggests that Lien inaccurately described its property interest as a severed mineral estate. (Board Opp. Cert. 5). However, Board does not offer any legal authority in support of this claim nor does Board suggest what the property interest is.

clearly establishes that the only commercially recoverable mineral on the property is the sand leased by Lien.

Based upon this record, Board moved for summary judgment. Lien opposed Board's motion for summary judgment, arguing that takings litigation involve factual issues that normally cannot be resolved except on a complete record or trial. *Yuba Goldfield, Inc. v. United States*, 723 F.2d 884, 887, 891 (Fed. Cir. 1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 295 (1981). Despite the objections, Board's motion for summary judgment was granted by the District Court and that decision was affirmed by the Colorado Court of Appeals. Thus, the attempt by Board and Intervenor to now rely upon facts which are not in evidence to support their argument that Board's denial was not a categorical taking is inappropriate. *Jafay v. Board of County Commissioners*, 848 P.2d 892 (Colo. 1993). If material facts are in dispute then summary judgment should not have been granted. *Id.*

In its opposition, Board argues for the first time that Board's denial of Lien's application was not a categorical taking because Lien's application covered only a portion of the land subject to the lease. (Bd. Opp. Cert. 6). Board assumes that other portions of the property subject to the lease include commercially recoverable sand. Here again, Board's argument is predicated upon assumed facts which are not a part of the record. There is absolutely no basis in the record for concluding that Lien has property rights which were not rendered worthless by Board's denial of Lien's application.

Board and Intervenor continue their argument that Board's denial was not categorical because Lien retained sticks in the bundle of rights. (Bd. Opp. Cert. 9). Presumably the sticks still remaining in Lien's bundle of rights are other minerals and hydrocarbons. But, as already indicated, the record does not support this argument. It is pure speculation at this time to assume that other minerals are located on the property.[2]

Perhaps the most incredible argument made by Board and Intervenor is their argument that the surface estate, which is **not** owned by Lien or Rock Springs Royalty Company, should be included with the subsurface mineral estate (Bd. Opp. Cert. 9). Both the surface estate and subsurface estate should form the denominator, according to Board and Intervenor. They argue that because Board's action does not affect the surface owner's use of the surface of the property the denial cannot be considered to be a categorical denial. (Bd. Opp. Cert. 9, Intervenor Opp. Cert. 6). Their argument ignores both the fact that the surface is owned by a third party who was not involved in this action and the numerous authorities cited by Lien in its Petition which conclusively establish that a severed mineral estate is a

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[2] Board also implies that Lien waived its Fifth Amendment right to just compensation. Board bases this suggestion upon one unsworn comment by Lien at the hearing before Board that Lien would be willing to consider terminating mining at a different quarry (Weaver Quarry) provided Board granted use on review in this case. (Bd. Opp. Cert. 6). However, Board fails to cite any legal authority that Lien's willingness to consider this would constitute a legal waiver of a constitutional right.

separate property interest which is entitled to constitutional protection. (Lien, Petition 12-13).

Neither Board nor Intervenor offer any legal authority in support of this argument nor does Lien believe any authority exists. On the other hand, Lien has cited numerous authorities which establish that regardless of whether or not a property owner owns both the surface and subsurface estates, denial of mining is a taking. For example, in the context of mineral leases, the Federal Circuit in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 592 (1991) did not accept the government's argument that denial by the United States of a license to mine coal would not constitute a taking because the coal owner could farm the surface estate. In other words, the coal owner retained sticks in the bundle of rights, i.e., the surface estate.

Finally, Board and Intervenor rely upon *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) to support their proposition that Board's denial was not a categorical taking. (Bd. Opp. Cert. 7-9; Intervenor Opp. Cert. 8-10). Both cases have no applicability. *Keystone* does not apply because it is not a categorical taking case. *Penn Central* does not apply because, in addition to not being a categorical taking, it involved but one owner of the entire property interest. Compare the *Penn Central* single ownership with this case in which severance of the surface from the subsurface estates occurred early in the century. The severance did not occur contemporaneously with the lease of the subsurface mineral estate to Lien and cannot by any stretch of the imagination be viewed as an attempt to bootstrap into the

Lucas analysis. (Amicus Curiae Brief of Union Pacific, Colo. Ct. of App., p. 1).

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR THIS COURT TO ESTABLISH THAT A PARTY'S KNOWLEDGE OF AN EXISTING REGULATORY SCHEME DOES NOT CREATE AN EXCEPTION TO THE RULE THAT A CATEGORICAL TAKING REQUIRES JUST COMPENSATION

Board and Intervenor both argue that Board's denial was not a categorical denial of all use and, thus, the appropriate standard in this case is the ad hoc factual inquiry approach this Court set forth in *Penn Central*, rather than the analysis this Court set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Essentially, both Board and Intervenor iterate the mistake made by the Colorado Court of Appeals when it failed to even address the categorical nature of the use deprivation.

For example, neither the Colorado District Court nor the Colorado Court of Appeals ever addressed, and they certainly did not decide that the denial by Board was not a categorical taking. Instead, the Colorado courts deliberately ignored the issue, choosing instead to focus on the fact that at the time Lien acquired its interest in the lease it was aware of the existing regulatory scheme. In reliance on this, the Colorado courts applied the *Penn Central* analysis and held that Lien's investment-backed expectation was unreasonable. Appendix A, App. 9, 10. The Colorado courts refused to recognize that Lien's knowledge of an existing regulatory scheme does **not** create an exception to the rule that a categorical taking requires just compensation.

This Court stated in *Nollan* that the timing of property acquisition vis-à-vis governmental regulatory authority is not determinative of the right to just compensation. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n. 2. Several states including Florida, Massachusetts, New Jersey and Michigan and the Federal Court of Appeals have all followed the *Nollan* language and reject the notice of regulatory authority argument as an exception to the requirement that just compensation be paid in a categorical taking case.[3] Moreover, despite this Court's *Nollan* language, the Colorado courts in this case chose to ignore the clear import of the language. Other courts have chosen to do the same.

The disregard the Colorado courts have for the *Lucas* analysis in categorical takings is and will be shared by other courts, especially when they recognize their decisions will not be overturned. On the other hand, the Federal Court of Appeals and the courts of several other states have rejected the Colorado approach, choosing to follow this Court's lead in *Lucas*.[4] Therefore, rather than

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[3] Lien, Petition pp. 17-24.

[4] *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Vatalaro v. Department of Environmental Regulations*, 601 S.2d 1123, *review denied*, 613 S.2d 3 (Fla. 1992); *Lopes v. City of Peabody*, 32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992), *review denied*, 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted* and *judgment vacated*, 113 S.Ct. 1574 (1993), *on remand*, 417 Mass. 299, 303, 629 N.E.2d 1312, 1314-15 (1994); *Moroney v. Mayor and Council*, 633 A.2d 1045 (N.J. Super A.D. 1993); *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996).

the uniformity this Court adopted in *Lucas*, regulatory takings will regress to the point of " . . . eschew(ing) any 'set formula' for determining how far is too far, preferring to 'engag(e) in . . . essentially ad hoc factual inquiries' " *Lucas*, 505 U.S. 1003 at 1015.

Therefore, this case is an appropriate vehicle for this Court to confirm that it meant what it said in *Nollan*, i.e., that timing of property acquisition vis-à-vis knowledge of a regulatory scheme is not the determinative issue in deciding just compensation. Lien respectfully suggests this Court must confirm that the *Nollan* language applies in a categorical taking case. Without such declaration from this Court, the Fifth Amendment right to just compensation will depend entirely upon where (in which state) the property is located rather than the analysis this Court set forth in *Lucas*.

Furthermore, this case is not burdened with corollary issues. For example, the property interest here is clearly only a severed mineral estate which was severed early in the century. No use remains for the severed mineral interest. Under Colorado law, mining cannot prospectively be declared a nuisance.[5] *Green v. Castle Concrete Co.*,

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[5] Because there can be no prospective determination that Lien's proposed use (i.e., mining) would create a nuisance, Board cannot assert the second prong of *Lucas* as a defense. *Green*, 509 P.2d at 588. This did not stop Board and Intervenor in making the argument nor did it stop the Colorado courts in concluding as much when, for example, the Court of Appeals concluded that " . . . the proposed use to be inappropriate at that particular site." Appendix A, App. 10, 11. This conclusion by the Court of Appeals was based upon unsworn anecdotal speculation testimony that Lien's proposed use might in the

509 P.2d 588 (Colo. 1973). Thus, this case can set the stage for this Court to reject an expansion of the narrowly tailored *Lucas* exception to the requirement of just compensation in categorical takings cases.

This Court can and should clearly hold that a party's knowledge of an existing regulatory scheme is not a defense from the requirement that just compensation be paid in a total takings case. Without a clear pronouncement by this Court, the guarantee of just compensation will continue to be unequally applied by the courts in the various states.

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future constitute a nuisance. This finding by the Court of Appeals that Lien's proposed mining would constitute a nuisance precluded Lien from its right to defend itself in a court of law against a claim that its mine constituted a nuisance. Thus, the very essence of the *Lucas* holding has been emasculated by the Colorado courts because Lien gets neither just compensation nor the right to defend itself.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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